

When recorded, return to:

City of Tempe
31 East Fifth Street
Tempe, Arizona 85281
Attention: City Clerk

FIRST AMENDMENT TO
DEVELOPMENT AGREEMENT
C2011-161A

THIS FIRST AMENDMENT TO THE DEVELOPMENT AGREEMENT ("**Amendment**") is made as of the ____ day of _____, 2012, by and between THE CITY OF TEMPE, an Arizona municipal corporation ("**City**") and BREOF TEMPE LAND LP, a Delaware limited partnership ("**Developer**")

RECITALS

A. City and Developer are parties to that certain Development Agreement dated as of October 20, 2011, and recorded as Instrument No. 20110983997, Official Records of Maricopa County, Arizona (the "Development Agreement").

B. City and Developer now desire to amend the Development Agreement in certain respects, as more particularly set forth below.

C. The City is authorized to enter into development and disposition agreements pursuant to A.R.S. §9-500.05.

D. This Amendment is a development agreement within the meaning of A.R.S. §9-500.05 and shall be construed as such.

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the parties hereto, the parties agree as set forth below:

1. **Definitions.** Capitalized terms used herein without definition shall have the meanings given such terms in the Development Agreement.

2. Section 2.2 of the Development Agreement is hereby amended in its entirety to read as follows:

2.2. Termination. This Agreement shall automatically terminate if Developer fails to commence construction of the Project (as described in the PAD) within twenty-four (24) months after the Effective Date. Failure to commence construction is not a default, but a condition to be satisfied for the continuing effectiveness of this Agreement; consequently, Developer shall not be entitled to any notice or cure period if the condition is not satisfied. On any such termination, this Agreement shall be null and void.

3. **Applicability of Develop Agreement.** Except as amended hereby, the Development Agreement shall remain in full force and effect.

4. **Governing Law.** This Amendment shall be governed by and construed in accordance with the laws of the State of Arizona. This Amendment has been made and entered into in Maricopa County, Arizona.

5. **Successors and Assigns.** This Amendment shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto to the extent permitted in the Development Agreement.

6. **Waiver.** No waiver by either party of any breach of any of the terms, covenants or conditions of this Amendment shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

7. **Attorneys' Fees.** In the event of any actual litigation between the parties in connection with this Amendment, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

8. **Severability.** In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Amendment shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Amendment shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, provided that the overall intent of the parties is not materially vitiated by such severability.

9. **Entire Agreement.** This Amendment constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

10. Recordation of Agreement. This Amendment shall be recorded in the Official Records of Maricopa County, Arizona, within thirty (30) days after its approval and execution by the City.

[Remainder of page intentionally left blank, signature pages follow]

IN WITNESS WHEREOF, the City has caused this Amendment to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and Developer have executed the same on or as of the day and year first above written.

ATTEST:

"CITY"

THE CITY OF TEMPE, an Arizona
municipal corporation

City Clerk

APPROVED AS TO FORM:

By _____
Mark W. Mitchell, Mayor

City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this _____ day of _____, 2012, before me, the undersigned officer, personally appeared Mark W. Mitchell, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation, whom I know personally and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

Notary Public

“DEVELOPER”

BREOF TEMPE LAND LP, a Delaware limited partnership.

By: BREOF TEMPE LAND GP LLC, a Delaware limited liability company

Its: General Partner

By: _____

Its: _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this _____ day of _____, 2012, by _____, the _____, of BREOF TEMPE LAND GP LLC, a Delaware limited liability company, the General Partner of BREOF TEMPE LAND, LP, a Delaware limited partnership, on behalf of the said limited partnership.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

NOTARY SEAL